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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-288

No. 1855

A. ZERKOWITZ & CO. INC.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

BRIEF OF THE FOOTWEAR GROUP, AMERICAN IMPORTERS ASSOCIATION, AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF THE FOOTWEAR GROUP, AMERICAN IMPORTERS ASSOCIATION, AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

This brief is submitted with consent of the parties on behalf of the Footwear Group of the American Importers Association, 420 Lexington Avenue, New York, New York 10017, as *amicus curiae* in support of the petition by the plaintiff below, A. Zerkowitz & Co. Inc., for certiorari to the Court of Customs and Patent Appeals.

The Footwear Group is an unincorporated association of 23 footwear importers, most of whom do presently and did

during the years 1958, 1959 and 1960 import rubber-soled footwear with fabric uppers, the appraisement of which for customs purposes would be controlled by the decision in the case at bar. Members have appeals pending in the Customs Court which constitute a substantial part of the 16,153 value cases,[1] referred to in the petition for certiorari, which are suspended pending the final decision in this case.

The Footwear Group operates under the general supervision of the American Importers Association, formerly the National Council of American Importers, an incorporated trade association, which is the oldest and most respected organization serving the interests of the import trade of the United States.

REASONS FOR GRANTING CERTIORARI

It is submitted that certiorari should be granted to determine whether the Court below correctly decided the question whether American Selling Price valuation of rubber-soled footwear instituted in 1933 pursuant to Section 336 of the Tariff Act of 1930, 19 U.S. Code § 1336, continued to be effective notwithstanding the enactment of Section 350 (a)(2)(a) of the Trade Agreements Act of 1934, 19 U.S. Code § 1352, and the subsequent execution of a trade agreement reducing the rate of duty.

This is an important question of federal law which has not been, but should be, settled by this Court.

Some background is required. The practical issue is whether the imported sneakers should have been appraised at 20 percent *ad valorem* on their own value, or on the selling price of a like or similar American made shoe, leading to a duty four or five times higher. The latter, known as

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[1]The value of these entries is not known. The value of all imports of rubber-soled footwear with fabric uppers subject to ASP valuation in 1960, as reported by the U.S. Department of Commerce, was $37.6 million.

American Selling Price or ASP valuation, is an anomalous and controversial method of Customs valuation[2] which is found only in a limited part of the customs practice of the United States. It was introduced into the American law by the Fordney-McCumber Tariff of 1922 after a bitter debate.

The Fordney Bill which had been passed by the House of Representatives in 1921 adopted as the basic method of valuation for all imports the so-called "American" method, which had long been advocated by protectionists, because overt rates of over 100 percent on the value of the imports themselves were not acceptable. If they could raise the valuation rather than the rate, the object of high protection could be realized without calling so much attention to it.

The Senate rejected the American valuation principle, but it approved the so-called "flexible" or "scientific tariff" providing for duties to equalize the cost of production at home and abroad. When the Senate and House bills came to conference, ASP was made the statutory basis for appraisement of benzenoid chemicals; the "flexible" tariff was approved potentially for all imports through Tariff Commission action; and it was provided that if the Tariff Commission found that a duty increase of 50 percent would not equalize the costs of production at home and abroad, then ASP valuation should be adopted.[3]

American Selling Price valuation was applied by the Tariff Commission and the President only five times under Section 315 of the 1922 Act. One proclamation was held invalid

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[2] It is contrary to Article VII of the General Agreement on Tariffs and Trade, T.I.A.S. No. 1700 (except for the saving clause for existing legislation), which provides that value should be based on the actual value of imported merchandise, or of like merchandise, not on the value of merchandise of national origin or arbitrary or fictitious values.

[3] See generally, R. Elberton Smith, Customs Valuation in the United States (1948).

for lack of adequate notice, and in the other four cases, the unusual method of valuation was dropped when Congress enacted the Tariff Act of 1930.

There have been only three cases resulting in ASP valuation under Section 336 of the Tariff Act of 1930, which reenacted Section 315 of the 1922 Act. Each of these is still in effect: rubber-soled and rubber footwear (T.D. 46158) (except that rubber-footwear was removed from ASP appraisement by P.L. 89-241 of 1965); canned clams (T.D. 47031); and certain wool knit gloves of an obsolete value bracket (T.D. 48183).

With the enactment of the Trade Agreements Act of 1934, a new chapter in American trade policy commenced. The idea of fixing tariffs to equalize the cost of production at home and abroad was abandoned. Instead, it became the policy of the United States to reduce tariffs through reciprocal negotiations. It was provided by Section 350(a)(2)(a), 19 U.S. Code § 1352, that Section 336 should be inapplicable to any article the rate of which was reduced in the course of trade negotiations. In such case, a different method of relief was opened to U.S. industries that might be affected adversely by increased imports, namely a petition to the Tariff Commission under Section 7 of the Trade Agreements Act of 1951 (prior to that by Presidential order), 19 U.S. Code § 1364 (superseded by § 301 of the Trade Expansion Act of 1962, 19 U.S. Code § 1901).

Section 336 was not repealed, presumably because it was the desire of the Congress to afford some method by which American industries which were adversely affected by imports could obtain relief even though the rate was unchanged by any trade agreement.

With respect to those cases in which Section 315 or Section 336 had been invoked to increase the rates of duty, those rates could be reduced through trade agreements, and in practically all cases this was done. Relief was available to a domestic industry affected through Section 7, and Sec-

tion 336 became inapplicable. Section 336(f) provides for the modification or termination of action taken to increase the tariff or change the basis of valuation, by a new application and under the same standards; this was of course superseded when a trade agreement was made.

Thus if the position of the Court below is sustained, the anomalous method of valuation which was intended by Congress to be subject to change by administrative action has become irrevocably fixed in the law, short of Congressional legislation. The sensible reading is that rates of duty and appraisement methods proclaimed under Section 336 all became suspended immediately upon the execution of a trade agreement by virtue of Section 350(a)(2)(a) of the Trade Agreements Act of 1934. Technically, this would have been true of rates of duty as well as method of valuation, but with respect to rates of duty the question is academic, because the trade agreement itself fixed a new rate of duty.

The 20 percent rate of duty on the value of the imports themselves, rather than ASP, put actual duties on rubber-soled footwear with fabric uppers in line with those on leather footwear originally provided for in paragraph 1530 (e) of the Tariff Act of 1930.

The case at bar involves the situation as presented by the entries of 1958, 1959 and 1960. Since then, the Congress enacted the Trade Expansion Act of 1962, under which the Kennedy Round of tariff negotiations was conducted. In this Round, agreements were made, subject to necessary Congressional legislation, to remove ASP valuation of chemicals, to which strong objection had been taken as a non-tariff trade barrier, and also of canned clams and wool knit gloves. The Congress has not yet acted upon these agreements. No agreement was entered into with respect to rubber-soled footwear. See House Report No. 91-1435, on H.R. 18970, 91st Cong., 2d Sess., page 52.

In 1963 the Tariff Schedules of the U.S. were revised, and Proclamation No. 2027 under Section 336 relating to

ASP duties on footwear became Headnote 3(b), Subpart A, Part I, Schedule 7 of the Tariff Schedules of the United States, 19 U.S. Code § 1202. Because of language changes, the decision in this case would not be determinative with respect to the method of valuation of imports of rubber-soled footwear with fabric uppers which are currently imported. The decision in this case would, however, lay the foundation for such a determination.

CONCLUSION

Certiorari should be granted to review the question whether ASP valuation was applicable, as a matter of law, to any imports of rubber-soled footwear during the years 1958, 1959 and 1960.

Respectfully submitted,

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